

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 27 October 2004**

**CASE NO: 2004-AIR-26 (formerly 2002-AIR-21)**

**IN THE MATTER OF**

**GREGORY A. FORD,**  
**Complainant**

**v.**

**NORTHWEST AIRLINES, INC.,**  
**Respondent**

**DECISION AND ORDER DISMISSING COMPLAINT**

On October 18, 2002, the undersigned issued an Order Granting Respondent's Motion to Dismiss Case in Part and Order of Remand to OSHA dismissing Complainant's May 25, 1999 discharge allegations as untimely having been filed more than 90 days after the alleged discriminatory discharge, but remanding the case to OSHA for an investigation into allegations of blacklisting occurring within 90 days of the filing of November 1, 1999; March 28, 2002 and August 8, 2002, dates on which Complainant filed complaints with the District Court for the Fourth Judicial District of Minnesota, OSHA, and the undersigned respectively. Respondent filed a petition for review with the Administrative Review Board challenging the remand and arguing that the case should be dismissed in its entirety. On January 24, 2003, the Board dismissed Respondent's petition as an interlocutory appeal that did not fall within the collateral order exception to the finality rule. Thereafter on remand, OSHA investigated the blacklisting allegations and on March 15, 2004 issued its determination finding no reasonable cause to believe that Respondent had violated the Act.

On June 4, 2004, this case was set for hearing on September 21, 2004, with deadlines of August 9, 16, and 23, 2004, for conclusion of discovery and filing of non-dispositive and dispositive motions. On July 15, 2004, Respondent's counsel served upon Complainant a set of 9 interrogatories and 13 requests for document production related to the instant complaint. On July 26, 2004, Respondent noticed Complainant's deposition for August 5, 2004. Complainant refused to comply with Respondent's discovery request based upon a loss of counsel, and on August 2, 2004, requested a delay in this proceeding in order to locate and retain competent counsel. Based upon Complainant's request, the undersigned on August 5, 2004 issues an order rescheduling hearing and amended pre-hearing order setting the hearing for November 2, 2004 with discovery, non-dispositive and dispositive deadlines of September 20, 27, and October 4, 2004. In that order Complainant was reminded of his obligation to comply with Employer's discovery request by September 20, 2004 whether he had obtained counsel or not.

On August 23, 2004, the undersigned by letter again reminded Complainant of his obligation to cooperate with reasonable discovery requests and to abide by deadlines in the pre-hearing order. The undersigned also provided Complainant a copy of the Rules of Practice for Administrative Hearings before the Office of Administrative Law Judges and noted that Section 18.6 of said Rules provided sanctions for failure to comply with appropriate discovery requests. On August 23, 2004, the undersigned rescheduled the hearing for November 15, 2004, setting discovery, non-dispositive and depositive deadlines of October 8, 12, and 18, 2004.

On October 1, 2004, Respondent's counsel set October 4, 2004 for receipt of discovery responses with Complainant's deposition set for October 7, 2004. On October 2, 2004 Complainant, by fax, requested an indefinite stay in the discovery process due to a stroke suffered by his grandmother, and to an unwarranted assumption on his part, that additional time would be granted while the undersigned reconsidered my original decision finding the complaint about his discharge of May 29, 1999 to be untimely. On October 4, 2004, the undersigned issued an order denying Complainant's motion for reconsideration, but granting an additional week, or until October 15, 2004 for conclusion of discovery with non dispositive and dispositive deadlines of October 19 and 25, 2004.

Pursuant to the October 4, 2004 order, Respondent's counsel set October 11, 2004 for receipt of Complainant's discovery responses and October 14, 2004 for Complainant's deposition. Complainant refused to comply.

On October 12, 2004, Respondent's counsel filed for the second time a motion to dismiss due to Complainant's refusal to participate in the discovery process. Accompanying the motion, was a detailed 23 paragraph affidavit from Respondent's counsel detailing repeated attempts at securing discovery responses and Complainant's deposition only to met by a continuing pattern of refusals. On October 15, 2004 the undersigned issued an Order to Show Cause setting forth the procedural history of this case and again reminding him of sanctions set forth in Section 18.6 of the Rules of Practice and Procedure for Administrative Hearings. Those sanctions include: (1) an inference that the admissions, testimony, or documents would be adverse to the non-complying party; (2) a ruling that the matters concerning the order be established adversely to the non-complying party; (3) a ruling that the non-complying party may not introduce evidence or otherwise rely upon said party's testimony; (4) a ruling that the non-complying party may not object to the introduction and use of secondary evidence to show what the withheld admission, testimony, or documents would have shown; and (5) a ruling that a pleading, motion or submission of the non-complying party be stricken, or that a decision be rendered against non complying party.

On October 25, 2004, Complainant, by fax, replied to the Order to Show Cause contending that: (1) his current employer and Respondent were responsible for preventing him from working for the past 3 months; (2) Respondent allegedly denied discovery in his state court proceeding; (3) his grandmother's stroke and hospitalization caused a delay in responding; (4) he expected a delay in discovery pending the undersigned's ruling of his motion for reconsideration; (5) he had to spend a great deal of time and effort to deal with a medical certificate issue allegedly caused in part by Respondent, which prevented his flying for his current employer, Southeast; (6) he has been unable to obtain counsel; (7) on October 7, 2004, Southeast told him to report for an assignment; and (8) most importantly he expected an upcoming pilot interview with a reputable airline.

Section 18.29 (a)(8) of the Rules provides that an administrative law judge has the authority to take appropriate action authorized by the Federal Rules of Civil Procedure. Rule 37 (b)(2) (C) permits the court to dismiss an action against the party who refuses to obey an order to provide or permit discovery. Although dismissal of an action with prejudice is an authorized sanction, it is generally invoked as a last resort where the record clearly shows delay or contumacious conduct, and a lesser sanction would not better serve the interests of justice. *Billings v. Tennessee Valley Authority*, Case No. 89-ERA-16 at 2, 3 (Sec'y July 29, 1992); *review denied sub nom Billings v. Reich*, 25 F.3d 1047 (Table) (6<sup>th</sup> Cir. 1994)(unpublished opinion); *Tracanna v. Artic Slope Inspection Service*, Case No.

97-123 (ARB November, 1997). In the present case, the undersigned is convinced that Complainant has no intention of complying with discovery orders as based upon his past and present conduct, wherein despite repeated attempts to assist him in complying, he has found so called “grounds” for refusing to provide necessary information. Complainant has an established record of intentional refusal to cooperate. Lesser sanctions cannot effectively address this conduct.

In *Malpass et al. v. General Electric Co.*, Case No 85-ERA-39 (Sec. Final Dec and Ord., Mar. 1, 1994) the following four factors were considered in determining whether dismissal was warranted:

1. Complainant’s degree of personal responsibility;
2. The amount of prejudice to respondent/employer;
3. The presence of a drawn out history of deliberately proceeding in a dilatory fashion; and
4. The effectiveness of sanctions less drastic than dismissal.

In the present case all four factors weigh in favor of dismissal. Complainant bears full responsibility for non-compliance. Respondent has been put to the expense of repeated, but unsuccessful attempts at discovery. Complainant has deliberately drawn out the discovery process much longer than it should have been. Sanctions, less severe than dismissal would only encourage more dilatory action. Dismissal is appropriate under Sections 18.6, 18.29(a)(8) of the Rules of Practice and Procedure for Administrative Hearings, 29 C.F.R. Part 18 and Rule 37 (b)(2)(C) of the Federal Rules of Civil Procedure.

## **ORDER**

Respondent’s Motion to Dismiss with prejudice is GRANTED

A

CLEMENT J. KENNINGTON  
ADMINISTRATIVE LAW JUDGE

**NOTICE OF APPEAL RIGHTS:** This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board (“Board”), US Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington

DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. An exception not specifically urged ordinarily shall be deemed waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U. S. Department of Labor,